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IN THE

Supreme Court of the United States

No. 73-348

JESSE S. BAGGETT, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Jesse S. Baggett petitions for a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Fourth Circuit, entered in this cause on July 26, 1973.

OPINION BELOW

The Opinion of the Court of Appeals is not yet officially reported. It is reprinted in the Appendix hereto.

JURISDICTION

The Opinion of the United States Court of Appeals for the Fourth Circuit was originally filed on June 19, 1973. A timely Petition for Rehearing was filed on July 3, 1973 and on July 26, 1973 the Court of Appeals denied the Petition for Rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The District Court's jurisdiction was invoked under 18 U.S.C. § 3231.

QUESTIONS PRESENTED

1. Whether Petitioner, Jesse S. Baggett, may properly be convicted of violation of 18 U.S.C. § 1952 (The Travel Act) for allegedly causing (under 18 U.S.C. § 2) the interstate movement of a check from a co-defendant, Ralph D. Rocks, from the District of Columbia to himself in Maryland for the purpose of promoting bribery, where Petitioner at no time traveled across state lines; where he was not shown to have mailed or caused mailing or transportation across state lines of the check; where both Petitioner and the co-defendant were Maryland residents; and where the check was drawn on a Maryland bank and delivered to a Maryland farm equipment company.

2. Whether in presenting evidence of the "intent" of Petitioner in a federal prosecution, the Government may introduce evidence of an alleged prior offense for which Petitioner had previously stood trial and of which he had been acquitted on the merits by a Circuit Court of the State of Maryland.

3. Whether Petitioner's right to confrontation was denied by the trial judge's order forbidding cross-examination or disclosure to the jury that a key Govern-

ment witness who was a federal prisoner and was suffering from Hodgkins disease had his medicine withheld for a period of several days surrounding the Government's negotiations with him to persuade him to testify against Petitioner.

STATEMENT

a. Proceedings Below

Petitioner, Jesse S. Baggett, and co-defendant, Ralph D. Rocks, were charged in a single count indictment by a federal grand jury in the District of Maryland on December 19, 1969 with violation of the Travel Act, 18 U.S.C. § 1952 and 18 U.S.C. § 2. The indictment charged that Petitioner, formerly a member of the Board of County Commissioners of Prince George's County, Maryland and Ralph D. Rocks, also a Maryland resident, had caused the movement of a Rocks Engineering Company check from the District of Columbia to Maryland into Petitioner's possession with the intent to promote bribery of Petitioner by Rocks. The check was drawn on a Maryland bank and was payable to a tractor company located in Harwood, Maryland (Govt. Ex. 1). The case was tried to a jury from October 4, 1971 to October 27, 1971.

b. Summary of the Evidence

The duties of the Prince George's County Maryland Board of County Commissioners of which Petitioner was one of five members included review of zoning applications. Co-defendant Ralph D. Rocks was a long time friend of Petitioner and was during the years in issue a developer in Maryland who had a number of zoning applications before the Commissioners. (Tr. 1002)

The Government presented no specific evidence of wrongful conduct by Petitioner or any attempt by him to influence any other Commissioner in any Rocks zoning cases. (A. 152-157). However, a tractor purchased by Rocks, with Petitioner's assistance, for use on Rock's projects was also used on Petitioner's farm on several occasions between 1965 and 1967. (Tr. 1005-1006, 1019, 1096).

The Government charged that the interstate movement of the check used to purchase the tractor constituted the interstate travel proscribed by the Travel Act. However, no evidence was offered to prove how the check moved from the District of Columbia to Maryland. Nor was there evidence that at any time prior to the movement of the check Petitioner knew of it, or that he knew Rocks would perform any act in the District of Columbia or elsewhere outside the State of Maryland. Resolving all inferences in favor of the Government, Petitioner and Rocks could at worst be found to have intended to purchase a tractor from a dealer in Maryland. There is no basis to infer that Petitioner might anticipate that Rocks would act through any of the corporations he owned or that, of his several corporations, it would be an out of state firm whose check would be used.

The Court of Appeals concluded that "The Government's evidence did not show a specific quid pro quo from Baggett to Rocks in return for the $3,500 check". (App. 2a) Nevertheless, the Government argued that there was a string of successful Rocks zonings. In fact the list of Rocks zonings showed many unsuccessful zonings due to withdrawals and to adverse rulings on requested zoning changes, some of which in-

cluded votes by Petitioner against the zonings requested by Rocks. (Jt. App. 127-129; 190-191; 100 Deft's Ex. 28).

The Government also introduced evidence of alleged "prior similar offenses". One of the prior offenses was the performing of work on an addition to Petitioner's home by a former close friend of his, Daniel Tessitore, in 1965.[1] Tessitore testified that, although he did not tell Petitioner, he in fact performed the work in the hopes of obtaining assistance on a pending zoning application. (Jt. App. 76-78). As a result of charges made by Tessitore, Petitioner had earlier been tried for bribery in a Maryland state court in 1967 and, after testifying in his own defense was acquitted on the merits as outlined in the Opinion of the Maryland Circuit Court admitted in evidence at trial in the case at bar. (Jt. App. 162-166). The state court held that Petitioner had not demanded a bribe, and he "took no part in the approval of this zoning." (Jt. App. 166). Although Petitioner "was subjected to severe cross-examination, his demeanor was that of one who did not possess a guilty conscience." (Jt. App. 166)

The Government called William Stevens as a Government witness and granted him immunity from prosecution. Stevens was a federal prisoner at the time of trial serving a term for tax evasion. He was incarcerated in a prison hospital because he was suffering from Hodgkins disease, a cancerous blood

[1] Evidence of paving done at Petitioner's farm and of a claimed gift of a small saunette and a loan to Petitioner were also introduced as other offenses although Petitioner was never charged with any such offenses.

disorder. Stevens required large doses of predizone several times a day to keep his disease in remission. Without the medicine he quickly went out of remission and broke out in bumps all over his body. (Jt. App. 67-71; 135-147) At the time of trial Stevens had a motion pending for early release from prison due to his potentially fatal illness. The Government advised him it would acquiesce in his motion if he testified truthfully against Petitioner.

The defense learned that shortly before trial Stevens' medicine had been withheld from him for a period of several days while the Government conducted the negotiations with him that persuaded him to testify against Petitioner. When the defense attempted to bring this motivation of Stevens' to the attention of the jury, however, the trial court forbade any such cross-examination. The defense filed a written motion for a mistrial and a hearing was held which confirmed that Stevens' medicine had in fact been withheld from him. However, the court still refused to let the jury hear or consider this evidence.[2] (Jt. App. 148)

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[2] Another instance of denial of cross-examination occurred during the testimony of Daniel Tessitore, who had been promised immunity from prosecution "for any crimes, evidence of which may be revealed by your testimony". (Jt. App. 94) The Jencks Act statements of Tessitore furnished to Petitioner during trial disclosed that one such offense for which he likely sought that immunity was his consistent failure to file federal income tax returns. He had informed the Government that he had not filed federal income tax returns "since 1965". (Jt. App. 215) The trial court barred defense cross-examination to reveal this evidence of motive. Thus, both Stevens and Tessitore were allowed to testify without impeachment as to these compelling motives to fabricate.

REASONS FOR GRANTING THE WRIT

1. The Use of Evidence of an Alleged Offense of Which Petitioner has Previously Been Acquitted in State Court Was a Denial of Rights under the Fifth Amendment Double Jeopardy Clause

The introduction into evidence against Petitioner of an alleged bribe of which a Maryland Circuit Court had found Petitioner innocent is fundamentally unfair. Petitioner urged that it violated the Fifth Amendment's double jeopardy clause and the principle of constitutional collateral estoppel. The Court of Appeals rejected the argument stating that Petitioner "was not being tried for that, . . ." (App. 3a). This conclusion misstates the Fifth Amendment principle of constitutional collateral estoppel announced in *Ashe* v. *Swenson,* 397 U.S. 436 (1970). Even if a defendant is not tried for the very offense of which he was acquitted, collateral estoppel bars the use of the prior offense of which he was acquitted, as evidence against him in a later case. *Wingate* v. *Wainwright,* 464 F.2d 209 (5th Cir. 1972).

This case presents a major question of criminal procedure heretofore addressed directly only by two appellate courts: whether evidence of a prior offense can be introduced against an accused in a federal prosecution despite the fact that he was acquitted of it on the merits by a state court of competent jurisdiction.

The Fifth Circuit has ruled that prior offenses are rendered inadmissible by the Fifth Amendment double jeopardy bar at least where both the prior acquittal and the current prosecution are in the same state. *Wingate* v. *Wainwright,* 464 F.2d 209 (5th Cir. 1972). The Fourth Circuit had earlier held that a

prior offense of the accused was admissible against him in a federal prosecution despite the fact that he had been acquitted of it in a state court. *United States* v. *Smith,* 446 F.2d 200 (4th Cir. 1971). In *Smith,* the court cautioned that the record did not adequately reveal whether the two offenses were in fact the same and speculated that the "dual sovereignty" principle on which its decision was based might soon be abandoned. The Fourth Circuit[3] elected to leave such a major development to this Court. 446 F.2d at 203, fn. 1.

Although not yet abandoned in all cases to which it has been applied, the "dual sovereignty" principle has suffered considerable erosion in recent years and has been expressly abandoned by this Court in at least three situations. In *Elkins* v. *United States,* 364 U.S. 206 (1960) the Court ruled that evidence illegally seized by state authorities could not be used by federal authorities. In *Murphy* v. *Waterfront Commissioner,* 378 U.S. 52 (1964), the Court held that a grant of

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[3] The Fourth Circuit has evidenced greater tolerance than other courts for the use of evidence of prior offenses. Compare *United States* v. *Mastrotatoro,* 455 F.2d 802 (4th Cir. 1972) (noting the "lavish" use of prior offenses evidence but upholding the conviction) with *United States* v. *Burkhart,* 458 F.2d 201 (10th Cir. 1972) (reversing a conviction due to the use of a remote prior offense); *State* v. *Santiago,* 492 F.2d 657 (Hawaii 1972) (adopting a rule forbidding impeachment of testifying defendants by the use of prior offenses); *State* v. *Pricur,* .. La. .., 12 Cr. L. 2512 (La. 1973) (establishing strict guidelines for the use of prior offenses evidence). The use of prior offenses evidence merely to blacken the defendant's image is being increasingly condemned. See *Loper* v. *Beto,* 405 U.S. 473 (1972) (defective prior convictions). The Fifth Circuit has concluded it is "fundamentally unfair" to admit evidence of a prior offense where, as here, the defendant was acquitted of it. *Wingate* v. *Wainwright, supra.*

immunity to a witness by a state authority barred the federal government from using the testimony compelled under the state's immunity grant. And in *Waller* v. *Florida*, 397 U.S. 387 (1970) the Court most recently rejected the "dual sovereignty" theory calling it an "anomaly" as applied to successive prosecutions by a municipality and a state. Prior to *Elkins*, *Murphy* and *Waller*, a second prosecution would have been allowed in each of those situations under the dual sovereignty rule.

Of those decisions, *Murphy* v. *Waterfront Commissioner* presents a striking parallel to the case at bar. The state grant of immunity precluded federal use of immunized testimony. Here the state in which Petitioner was acquitted is barred from using evidence of that matter against Petitioner by virtue of the Fifth Amendment's principle of double jeopardy that is equally as fundamental[4] as the privilege involved in *Murphy*. See *Ashe* v. *Swenson*, *supra*. The Court ruled in *Murphy* that "dual sovereignty" did not justify a departure from the self incrimination privilege. That ruling is a strong precedent that "dual sovereignty" is likewise not a compelling reason to depart from the Fifth Amendment's equally fundamental double jeopardy privilege. In deciding

[4] This Court has acknowledged the impact of a prior offense in a criminal trial stating in *Burgett* v. *Texas*, 389 U.S. 109 (1967) that admission of a "constitutionally infirm" prior conviction was error and was not cured or rendered harmless by instructions. See also *Loper* v. *Beto*, *supra*. If prior offenses that are accepted as relevant and are evidenced by convictions are, nevertheless, rendered inadmissible for reasons of fundamental fairness because they were obtained without the aid of counsel, it would appear to be at least worthy of resolution whether fundamental fairness forbids using a prior offense marked by an acquittal on the merits though by a state court.

Murphy, the Court correctly concluded that the Fifth Amendment privilege against compulsory self incrimination would mean very little if a witness could be forced to testify by a state grant of immunity and then be prosecuted with the use of that evidence by the federal government. Likewise, the double jeopardy and collateral estoppel principles of the Fifth Amendment will mean very little if he can be brought to trial and acquitted in a state court and then prosecuted with the use of that evidence a second time in a federal court.

Abandonment of the dual sovereignty rule (the only distinguishing feature between the case at bar and *Wingate* v. *Wainwright*, *supra*) is the subject of growing discussion in periodicals, case law and authoritative studies. See *Collateral Estoppel in Criminal Prosecutions: Time to Abandon the Identity of Parties Rule*, 46 So. Cal. L. Rev. 922 (1973); *Report of the National Commission on Reform of Federal Criminal Laws*, p. 61, comment to § 704; Cipes, *Criminal Defense Techniques*, Appendix A, *The ABA Standards for Criminal Justice*, § App. 08, p. App. 23.

This case is particularly worthy of review because the "dual sovereignty" rule is especially inappropriate here where a community of interests of the two sovereigns is an essential feature of the statute under which Petitioner was charged. Under the Travel Act, the federal government is empowered to act on behalf of state interests to prosecute state crimes which have been incorporated into a federal jurisdictional envelope. The state bribery statute is expressly charged in the federal indictment. Furthermore, the offense of which Petitioner was acquitted in state court was not an offense against federal law. Application of the rule of collateral estoppel would in no way deprive the fed-

eral government of its sovereign right to prosecute an offense against it. The "dual sovereignty" issue is thus presented here in a compelling statutory framework and trial setting. Full review and careful consideration should be given to eliminating "dual sovereignty" as an exception to the collateral estoppel rule of *Ashe* v. *Swenson, supra.*

2. The Absence of Any Interstate Travel Caused or Engaged in by Petitioner Precludes Federal Jurisdiction Under The Travel Act

The Travel Act prohibits the use of interstate facilities in furtherance of specified criminal conduct, including bribery. However, mere incidental use of a facility of interstate commerce is insufficient to confer jurisdiction under the Act. *Rewis* v. *United States,* 401 U.S. 808 (1971); *United States* v. *Botticello,* 422 F.2d 832 (2d Cir. 1970); *United States* v. *Altobella,* 442 F.2d 310 (7th Cir. 1971). Compare *United States* v. *Hawthorne,* 356 F.2d 740 (4th Cir. 1966), cert. denied 384 U.S. 908 (1966); *United States* v. *Judkin,* 428 F.2d 333 (6th Cir. 1970). Congress enacted the Travel Act with an acute awareness that "an expansive Travel Act would alter sensitive federal-state relationships, could over extend limited federal police resources, and might well produce situations in which the geographic origin of [interstate travelers], a matter of happenstance, would transform relatively minor state offenses into federal felonies". *Rewis* v. *United States,* 401 U.S. 808 at 812 (1972) [5]

[5] Similar apprehensions resulted in a limited construction of the Mann Act, 18 U.S.C. § 2421, the juridical scope of which, as refined by judicial decision, parallels the Travel Act. See *Mortensen* v. *United States,* 322 U.S. 369 at 376 (1940); *Twitchell* v. *United States,* 313 F.2d 425, 429 (9th Cir. 1963), *vacated and remanded sub nom. Rogers* v. *United States,* 376 U.S. 188 (1964), *after remand* 330 F.2d 759 (9th Cir. 1964).

The sole jurisdictional predicate for this prosecution was the movement of a check from the District of Columbia "into Baggett's possession in Maryland". (App. 2a) Not only were Petitioner and his co-defendant both residents of Maryland, but that state was the focus of all of their alleged conduct. There is no suggestion that either was involved in organized crime, or that anyone other than Maryland residents were even remotely involved in their activities.[6] Their activity was "essentially local" and thus wholly outside of the Act's ambit. See *United States* v. *McCormick*, 442 F.2d 316 at 318 (7th Cir. 1971). Such conduct does not necessarily require federal assistance. See *United States* v. *Altobella, supra.* Their conduct clearly did not involve the requisite "significant use of a facility of interstate commerce" required by the Seventh Circuit. *United States* v. *Altobella, supra,* 442 F.2d at 318.

This case presents an "essentially local" Travel Act prosecution which expands the Act to its broadest scope. A defendant who did not cross state lines, use an interstate facility or conspire with or cause anyone else to do so was charged based on mere passive receipt of a check. In supplying particulars of its one count indictment to explain the alleged basis for federal jurisdiction with respect to Petitioner's activity, the Government said that Petitioner could "reasonably foresee" that interstate movement would be involved in this matter. (Jt. App. 30).

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[6] Indeed all but three of the witnesses called by the Government were Maryland residents at the time of trial. The testimony of these witnesses was of little moment; and, in any event, each was subject to the process of the Maryland courts by virtue of the Maryland Uniform Law to Secure Attendance of Witnesses from Within or Without the State in Criminal Proceedings. Md. Code Ann., Art. 27, §§ 617-19.

Shortly after that Bill of Particulars was filed, this Court decided *Rewis* v. *United States,* 401 U.S. 808 (1972) and held that "reasonable foreseeability" of interstate movement as a basis of federal criminal jurisdiction does not merit acceptance. 401 U.S. 808 at 814. After the *Rewis* decision, the Government promptly amended its particulars, to delete its allegation of reasonable foreseeability but it could not change its proof. Reasonable foreseeability of interstate delivery or mailing of a check by Rocks was the most that the Government showed. Yet contrary to the decisions in *Rewis, Altobella* and *McCormick, supra,* the Fourth Circuit held that the Act applied.

Whether the Travel Act applies to a defendant and a transaction that is devoid not only of "significant use of a facility of interstate commerce" as required by the Seventh Circuit but in fact may fairly be said to be as devoid of interstate activity as is realistically possible in a mobile world, is an issue worthy of review.

The proper application of the delicate jurisdictional features of the Travel Act in jury cases such as this where the Act is invoked is especially worthy of review here. Contrary to the clear import of the Fourth Circuit's own decision in *United States* v. *Salsbury,* 430 F.2d 1045 (4th Cir. 1970), the trial court refused Petitioner's request to instruct the jury in any way with respect to the need to find that Petitioner had "knowledge and intent" concerning the single interstate act alleged in the indictment.[7]

[7] The trial court instructed the jury that the elements of the offense were only that Petitioner: (1) "caused another person to travel in interstate commerce"; (2) that he had the "intent to facilitate the promotion . . . of bribery . . ."; and (3) he "thereafter performed in the State of Maryland one or more acts which

3. Forbidding Defense Cross-Examination of a Key Government Witness Confined in a Federal Prison Hospital to Show His Medicine for Hodgkins Disease Was Withheld Was a Denial of the Right to Confrontation

The trial court barred defense cross-examination of a federal prisoner, William Stevens, as to motive. He suffered from Hodgkins disease and based thereon had filed a motion for the reduction of his sentence.

Stevens was one of the Government's principal witnesses. He had been told by the Government that it would not oppose his pending motion for a reduction in sentence if he testified "truthfully". During direct examination the Government disclosed the fact of this agreement but it failed to reveal that when the agreement was reached, Stevens had been deprived of some fifteen doses of his medicine over a period of five days and was mentally and physically debilitated. Because of these facts the defense attempted to cross examine Stevens to show, as this Court had held in *Alford* v. *United States,* 282 U.S. 687 (1930) it had an undeniable right to do, that his testimony was "affected by fear or favor growing out of his detention." 282 U.S. at 693. Nevertheless, the trial court barred this cross-examination into Stevens' motive to testify in a way that incriminated defendant in order to gain release from such total dependence on the Government. There were clear indications that Stevens' testimony was prompted by a strong need to conform his testimony to his previous statements to the Government. Yet the defense was not allowed to disclose to the jury the motive for his doing so. He was obviously affected by fear

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facilitated the promotion . . . of such bribery". (Jt. App. 194) Under this charge, the jury was inferentially told that it was unnecessary for it to find if Petitioner knew, should have known, or intended that there would be interstate activity.

growing out of his detention. *Alford* v. *United States, supra.* The right to confrontation requires that a defendant be permitted to reveal to the jury such a motive of a witness who is heavily dependent on a drug or, as here, a vital medication. *United States* v. *Kinnard,* 465 F.2d 566 (D.C. Cir. 1972). Such witnesses are "inherently unreliable". 465 F.2d at 571.

The Court of Appeals held that such denials do not affect "substantial rights". (App. 3a) Cross-examination to reveal a motive of a key witness to lie, however, is fundamental to a fair trial. *United States* v. *Masino,* 275 F.2d 129 (2d Cir. 1960)

This case thus presents a denial of the right to conduct cross-examination under the *Alford* rationale that is worthy of review. The extreme fear that may have been generated by the withholding, intentionally or negligently, of medicine needed to control a cancerous blood disorder may so disqualify a witness that a loss of the right to reveal such an extreme motive to give incriminating testimony is a denial of due process.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the Judgment and Opinion of the United States Court of Appeals for the Fourth Circuit.

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 72-1548

UNITED STATES OF AMERICA, *Appellee*,

versus

JESSE S. BAGGETT, *Appellant*.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Alexander Harvey, II, District Judge.

Argued October 4, 1972. Decided June 19, 1973.

Before Haynsworth, Chief Judge, Bryan, Senior Circuit Judge, and Russell, Circuit Judge.

John M. Bray, (John R. Risher, Jr., and Arent, Fox, Kinter, Plotkin and Kahn on brief) for Appellant; Russell T. Baker, Jr., Assistant United States Attorney, (George Beall, United States Attorney, on brief) for Appellee.

PER CURIAM:

The defendant, Baggett, and Ralph D. Rocks were jointly charged with a violation of the Travel Act.* Specifically, they were charged with causing the interstate movement of a $3500 check drawn by Rocks in the District of Columbia which Baggett used in Maryland to purchase a tractor

* 18 U.S.C. § 1952 and 18 U.S.C. § 2.

for use on his firm. Baggett, first tried after a severance, was convicted.

From 1954 until he resigned in 1970, Baggett was a member of the Board of County Commissioners of Prince George's County, Maryland. From December 1964 until his resignation, he was the Chairman of that Board. The Board had final authority over all zoning matters and proceedings.

Rocks was a prosperous builder and developer, based in the District of Columbia. Between 1962-1968, he was a frequent applicant for variances and zoning changes in Prince George's County, Maryland. Typically, he sought increased population density rulings and other changes which would enhance the value of lands he had acquired for development and their development potential. His applications usually received favorable action by the Board of County Commissioners until Baggett learned of the governmental investigation of his receipt of the check mentioned above and his use of it for the purchase of the tractor.

The check was made payable to the implement dealer, but the testimony showed that the check came into Baggett's possession in Maryland, that he took the check to the implement dealer and used it to pay for the tractor Baggett had selected. There was some effort on the part of the defense in Baggett's trial to show that the tractor was used only infrequently on Baggett's farm, but there was abundant evidence to support a finding that it was maintained on that farm and used regularly, or exclusively, there until the matter came under investigation.

The Government's evidence did not show a specific *quid pro quo* from Baggett to Rocks in return for the $3500 check. It did show a course of conduct of favors and gifts flowing from Rocks to Baggett. These included trips to Florida for Baggett and a William Stevens, who was in a position to expedite zoning applications on their way

to the Board of County Commissioners. It included a check made to cash, drawn by the Maryland zoning attorney for Rocks, which found its way into Baggett's checking account, though, after inquiry, it was claimed that that check represented a loan, and a like amount was repaid by Baggett to the lawyer.

The proof also showed receipt by Baggett of favors from others who had received favorable zoning rulings. After one such ruling, a man in the construction business built an addition to Baggett's house, while another in the paving business paved a road on Baggett's farm. Baggett was billed for neither and paid for neither. Baggett had been tried in a state court for the acceptance of the addition to his house, but the charges were thrown out on the ground that the bare fact of no billing and nonpayment was insufficient to show evil intent.

One of Baggett's contentions on this appeal is that the references to the house addition violated the double jeopardy principle. He was not being tried for that, however, and the Government was entitled to show a whole succession of such events, which, by their pattern, would warrant the inference of evil intention, which focus on the single event of the house addition did not.

The many instances of favors and gifts accepted by Baggett from Rocks and others receiving favorable rulings from the Board of County Commissioners were ample to show Baggett's corruption by the unprincipled greed of a wealthy man and Baggett's preference for favors and gifts over his public duty. The jury was clearly authorized to draw the inference and conclusion that the $3500 check represented a payment by Rocks to Baggett for continuing favorable zoning rulings.

After consideration of all of Baggett's claims of trial error, we find none affecting his substantial rights or the fairness of the trial. His conviction will be affirmed.

Affirmed.

Constitutional and Statutory Provisions Involved

United States Constitution

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall provide property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his deference.

Statute Involved

18 U.S.C. §1952:

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprsoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor, narcotics, or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

[Filed July 26, 1973 William K. Slate, II, Clerk]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 72-1548

UNITED STATES OF AMERICA *Appellee,*

v.

JESSE S. BAGGETT, *Appellant.*

Appeal from the United States District Court for the District of Maryland at Baltimore.

Upon consideration of the Petition for Rehearing *en banc*, and with the concurrence of the panel members and in the absence of a request for a poll of the whole court,

IT IS ORDERED that the Petition for Rehearing *en banc* be, and it hereby is denied.

FOR THE COURT:

/s/ CLEMENT F. HAYNSWORTH, JR.
Chief Judge, Fourth Judicial Circuit

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IN THE

Supreme Court of the United States

No. 73-348

JESSE S. BAGGETT, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

On August 24, 1973, Petitioner Jesse S. Baggett filed a Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit. The first question presented for review in the Petition (p. 2) is whether the Travel Act, 18 U.S.C. § 1952, can be extended to a case where, as here, Petitioner did not travel, conspire to travel, or cause anyone or anything to travel, interstate, but was a mere recipient of a check that travelled interstate to him. Subsequent to the filing of his Petition, the decision of the United States Court of Appeals for the Second Circuit in *United States* v. *Archer*, Nos. 1039, 1040, 1041, not yet

officially reported (decided July 12, 1973) became available upon the publication of an extract of that decision.[1] As a result of the *Archer* decision, a conflict now exists concerning application of the Travel Act to the factual situation at bar among three federal circuits.

In *Archer,* the Second Circuit rejected the broad and expansive construction of the Travel Act that the Fourth Circuit has employed in the case at bar and in earlier decisions.[2] Based on the Act's legislative history as well as this Court's decision in *Rewis* v. *United States,* 401 U.S. 808 (1971), it reversed the conviction of the recipient of an interstate phone call. In doing so the Second Circuit discussed with approval the Seventh Circuit's more restrictive view of the Act,[3] (App. 19a) and held that the Travel Act does not apply when there is but a single, incidental use of an interstate facility. The first question in Petitioner's Brief is predicated upon jurisdictional facts substantially similar in all material respects to those which the court, in *Archer,* held were insufficient to sustain a conviction under the Travel Act. Thus, there now exists a major conflict between the Fourth Circuit, the venue of the case at bar, and the Seventh and Second Circuits. The Second Circuit or the Seventh Circuit would indisputably reverse Petitioner's conviction had the venue been in either of those circuits.

In *Archer,* the Second Circuit held that proof of "the *receipt* of an interstate or foreign telephone call,

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[1] A copy of the Opinion is reprinted in the Appendix hereto.

[2] See *United States* v. *Salsbury,* 430 F.2d 1045 (4th Cir. 1970).

[3] See *United States* v. *Altobella,* 442 F.2d 310 (7th Cir. 1971); *United States* v. *McCormick,* 442 F.2d 316 (7th Cir. 1971).

in no way initiated by a defendant, even though expected by him," was insufficient to sustain a conviction for a violation of the Travel Act. (Emphasis is the Court's) App. 23a. The Court reasoned that the Travel Act's legislative history demonstrates that the Act is not violated when the use of an interstate facility is only "a casual and incidental occurrence" and not "the fulfillment of an integral part of the conspiratorial consensus," quoting *United States* v. *Corallo*, 413 F.2d 1306, 1325 (2nd Cir.) certiorari denied 396 U.S. 958 (1969). App. 18a.

In the Second Circuit a Travel Act conviction may not stand if the interstate travel is "minimal and incidental" or is a "matter of happenstance" in an illegal enterprise that is "essentially local." *United States* v. *Archer*, *supra*, App. 20a. The crucial interstate call in *Archer* "served no purpose that would not have been equally served by a call from New York." App. 22a.

Here Petitioner and his Co-defendant both were residents of Maryland, and all of their activities were concerned with Petitioner's performance of his duties as an elected official of a County of that State. Maryland was the locus of their conduct, and the transportation in some unproven manner of a single check from the District of Columbia to Maryland was a "casual and incidental occurrence." The Fourth Circuit interpretation of the Travel Act permits that single interstate transfer to serve as the sole jurisdictional predicate for Petitioner's indictment and conviction even though the evidence showed only the passive act of receipt by Petitioner in Maryland of a single check which was written in the District of Columbia against a Maryland bank by his Co-

defendant who was also a Maryland resident. Under *Archer* and *Altobella, supra,* this is legally insufficient use of an interstate facility to support Petitioner's conviction under the Travel Act.

National criminal statutes must be uniformly interpreted. Petitioner Baggett should not be convicted due to the accident of venue in the Fourth Circuit when there now are two circuits whose decisions would acquit him as a matter of law.

The case at bar and the *Archer* and *Altobella* decisions present a conflict among three circuits concerning this widely used statute. The Writ should be granted to resolve that conflict.

Respectfully submitted,

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APPENDIX

defendant who was also a Maryland resident. Under *Arrott* and *Hoffa*, supra, [illegible] use of an interstate facility to support Petitioner's conviction under the Travel Act.

National criminal statutes must be uniformly interpreted. Petitioner Doggett should not be punished due to the sentiment of venue in the Fourth Circuit when there now are two circuits whose decisions would acquit him as a matter of law.

The case at bar and the *Arrott* and *Hoffa* decisions present a conflict among three circuits concerning this widely used statute. The Writ should be granted to resolve that conflict.

APPENDIX

[illegible]

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

September Term, 1972

Nos. 1039, 1040, 1041

(Argued June 22, 1973 Decided July 12, 1973)

Docket Nos. 73-1527, 73-1528, 73-1711

UNITED STATES OF AMERICA, *Appellee*,

v.

NORMAN ARCHER, FRANK R. KLEIN AND LEON WASSERBERGER, *Defendants-Appellants*.

Before:

Friendly, Feinberg and Mansfield, Circuit Judges.

Appeal from a judgment of the District Court for the Southern District of New York, Charles H. Tenney, *Judge*, convicting defendants, after a verdict, on both counts of an indictment charging them with using telephone facilities in interestate and foreign commerce to commit bribery in violation of 18 U.S.C. § 1952, and with conspiring to commit the same offense. Reversed, with instructions to dismiss the indictment for failure of the evidence to show a crime against the United States.

Irving Anolik, Esq., New York, N. Y., *for Defendant-Appellant Norman Archer.*

Milton S. Gould, Esq., New York, N.Y. (Shea, Gould, Climenko & Kramer, New York, N. Y. of counsel), *for Defendant-Appellant Frank R. Klein.*

John L. Pollok, Esq., New York, N. Y. (Edward Gasthalter, Esq., and Lenefsky, Gallina, Mass, Berne & Hoffman, New York, N. Y. of Counsel), *for Defendant-Appellant Leon Wasserberger.*

Richard Ben-Veniste, Assistant United States Attorney, New York, N. Y. (Paul J. Curran, United States Attorney for the Southern District of New York, and Kenneth R. Feinberg and Richard J. Davis, Assistant United States Attorneys, of Counsel), *for Appellee.*

Friendly, *Circuit Judge*:

This case arises from what the Government characterizes as "part of an intensive combined Federal and local investigation into the nature and extent of corruption within the New York criminal justice system." Its brief tells us that the investigation "was premised on the belief that attempts to combat corruption in the criminal justice system"—to wit, New York City's—"through uncovering incidents of past wrongdoing had failed." It was essential the Government insists, to arrange "undercover penetration into ongoing corrupting activities" by having "a federal agent assume the role of a potential consumer of corruption." We do not at all share the Government's pride in its achievement of causing the bribery of a state assistant district attorney by a scheme which involved lying to New York police officers and perjury before New York judges and grand jurors; to our minds the participants' attempt to set up a federal crime for which these defendants stand convicted went beyond any proper prosecutorial role and needlessly injected the Federal Government into a matter of state concern.[1] However, we base our reversal of these convictions and our instruction to dismiss the indict-

---

[1] A special prosecutor has since been named by the Governor of New York to investigate precisely the kind of corruption in offices of New York City district attorneys at which the federal prosecutor's activities here were aimed.

The act of bribery that formed the basis for the federal prosecution here was not itself a federal crime, but a violation of §§ 200.00 and 200.10 of the New York Penal Law. That violation became a federal offense, according to the Government's theory, when interstate facilities were used to aid in committing it.

ment on the more limited ground that the Government did not provide sufficient proof of use or agreement to use interstate or foreign telephone facilities to satisfy the requirements of the so-called "Travel Act," 18 U.S.C. § 1952.

The plan for setting up a crime was conceived at a February 1972 meeting attended by Thomas Taylor, the Regional Director of the Bureau of Narcotics and Dangerous Drugs (BNDD); several special agents of the Bureau, including one Sante A. Bario; Vincent Murano, a New York City police officer; and two Assistant United States Attorneys for the Southern District of New York. According to the plan, Bario would assume the name Salvatore Barone and pose as a resident alien and member of the Las Vegas underworld. Murano would then "arrest" Bario in Queens County on the phony charge of the unauthorized possession of two loaded pistols, a felony under § 265.05 of the New York Penal Law. After his arraignment, Bario would make it known that he would be willing to pay a considerable sum to avoid trial or conviction on the charge. With Bario as bait, the planners hoped that some evidence of corruption would surface and that some use of interstate facilities would occur or could be arranged so that the incident of corruption would be transformed into a violation of the Travel Act.

Pursuant to the scheme, Taylor gave Bario two loaded pistols, a fake Nevada driver's license, and a false immigration card issued by the Immigration and Naturalization Service in Washington at the request of the Director of the BNDD. The next morning Murano effected the staged arrest at a diner in Queens. Murano then took Bario to a precinct house and filed a complaint and arrest affidavit falsely charging him with the unauthorized possession of loaded weapons.[2] Bario, in turn, lied about his name, his address, his marital status and his employment, produced

[2] Murano testified that he had done all this on the instructions of the two Assistant United States Attorneys.

the false Nevada driver's license and immigration card, and then certified to the correctness of the false report he had made. When a police officer at the precinct became suspicious about the immigration card, Bario had Murano call Taylor so that the latter could arrange for appropriate falsification of records in the Immigration and Naturalization Service in Washington. Subsequent to arraignment in Queens County Criminal Court, at which Bario lied about his identity, he was admitted to bail. A special agent of the Bureau of Narcotics, posing as Bario's father, "C. Barone," subsequently posted Bario's bail, which had been set at $5,000. After three adjournments, a preliminary hearing was waived and the case was forwarded for presentation to the grand jury.

Nicholas DiStefano, a figure not unknown to this court, see *United States* v. *DiStefano,* 464 F.2d 845 (2 Cir. 1972), who, the Government tells us, "was cooperating in a limited manner with the United States Attorney's Office," was then brought upon the stage. On April 19, DiStefano introduced Bario to defendant Wasserberger, an associate of a Manhattan bail bondsman. Wasserberger told Bario he was aware of the latter's arrest and had already spoken to a Queens attorney with "big connections," to wit, defendant Klein. Bario responded that he was "not interested just in any lawyer," but was "under the opinion that something more effective could be done." Wasserberger repeated that Klein had "strong connections" and that he could "do something" for Bario. When Wasserberger suggested that they drive to Klein's office, Bario agreed. While enroute, Wasserberger told Bario "it was too bad the case went before the grand jury, because it could have been taken care of before the lower court." Bario then said he "could not afford to be seen in a courtroom" and asked "what could be done." Wasserberger answered that they must try to "get the case kicked out before it went any further."

On meeting Klein, Bario first declined a proposal that he plead to a misdemeanor charge. Klein then echoed Wasserberger's advice that "the only thing then left to do was to have the grand jury return no indictment." To arrange that, Klein added, would cost a lot of money — probably between $10,000 and $15,000 in cash. He sought a telephone number where he could reach Bario in Las Vegas; Bario responded, truthfully for once, that he would be out of the country and that he would call Klein instead. Klein promised to have "an answer" by April 25 at the latest. Bario then paid Klein a $500 "retainer" and departed with Wasserberger. On the ride back to Manhattan, Wasserberger explained that part of the total payment would have to go to the assistant district attorney who would be in charge of the presentation to the grand jury. When Wasserberger asked how he could reach Bario in Las Vegas if that became necessary, Bario responded that he could be contacted by paging at the Sahara Hotel or, if that did not succeed, by leaving a message with the hotel telephone operator. In fact, Bario had no contacts whatsoever with the hotel.

On April 25 Bario, who had gone to France on a genuine narcotics investigation, called Klein from Paris. Klein arranged a meeting at his office for April 27, at which time he said he would have some news. Bario then flew back. Early on the morning of April 27 Bario and Murano, on instructions from an Assistant United States Attorney, went to a hotel in Newark, N. J., admittedly for the sole purpose of having Klein talk in an interstate telephone call. The calls began before 8 A.M., and were repeated every ten to fifteen minutes. At around 9 A.M., someone answered, and Bario asked that Klein return the call to him in Newark. Later that morning, Klein did.

Bario met Wasserberger and Klein at the latter's office later in the day. Klein reported that he had been in touch with the Queens assistant district attorney in charge of

the grand jury, and that the latter, who turned out to be defendant Archer, had suggested that Klein create a fictitious story to afford some justification for Bario's possession of the guns. The three men concocted a story whereby Bario would testify he was carrying cash as a "junket coordinator" for a Las Vegas hotel and was obliged to carry a pistol, for which he had a Nevada license; Klein and Wasserberger both assured Bario that no one would check the details. The story invented to justify possession of the second pistol was considerably more preposterous; Bario would explain that he was carrying the gun for a friend overnight so that the friend could avoid upsetting a young woman with whom he had a date. Klein then informed Bario that the grand jury hearing was scheduled for May 8. The total price was fixed at $15,000 in cash, including the $500 that Bario had already paid. Klein insisted that Bario deliver the $14,500 balance to him on May 5. Bario's plan to lie to the grand jury was disclosed to the Assistant United States Attorneys and sanctioned by them.

On May 5, Bario made an intrastate call to Wasserberger to postpone delivery of the $14,500. Wasserberger said he had been trying unsuccessfully to call Bario at the Sahara Hotel in Las Vegas in order to tell him that the grand jury appearance had been postponed from May 8 to May 9; it was agreed that the cash should be delivered on May 8. On that date, Bario delivered the money to Klein in marked bills, and Klein placed it in his safe deposit box.

After a dress rehearsal in Klein's office shortly after noon on May 9, Bario went to the grand jury room with Klein and Wasserberger. While the three were sitting in the waiting room, Klein pointed out Archer and said, "That's our man." Before the grand jury, Murano was first called to testify as to the details of the arrest. Bario then told his contrived tale, except that he did not mention the Nevada permit. Archer elicited that fabrication and led Bario as the latter denied awareness that the Nevada

permit did not entitle him to carry a gun in New York. The plan threatened to miscarry when a grand juror asked whether the existence of the Nevada pistol license had been verified, but Archer stepped into the breach by falsely asserting that it had. Before the grand jury retired, Archer made a statement minimizing Bario's offense and adding, untruthfully, that Murano had expressed some doubt whether his observation of the guns had been adequate to justify Bario's arrest. The grand jury returned no true bill. Following the successful culmination of the scheme, Government agents observed an encounter between Klein and Archer. About a month later they terminated their investigation by conducting searches, pursuant to warrants, of Archer's home and Klein's safe deposit box. On the view we take of the case, it is unnecessary to treat these events in detail.

II.

Mere recital of the facts in this case inevitably calls to mind the celebrated passage in the alternative ground of Mr. Justice Brandeis' dissent in *Olmstead* v. *United States*, 277 U.S. 438, 485 (1928):

> Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means — to declare that the government may commit crimes in order to secure the conviction of a private criminal — would bring terrible retribution.

Against that pernicious doctrine this court should resolutely set its face.

Justice Brandeis' statement is eloquent but his view, taken in full breadth, has never commanded the support of a majority of the Supreme Court. In *Olmstead* itself this portion of his dissent was joined only by Mr. Justice Holmes and Mr. Justice Stone.[3] While the first ground of the dissent, namely, that warrantless wiretapping violates the Fourth Amendment, 277 U.S. at 471-79, has since been vindicated, *Katz* v. *United States*, 389 U.S. 347 (1967), there has been no corresponding adoption of the second, based on the criminality of the acts of the Government agents under the laws of the State of Washington, 277 U.S. at 479-80. From *Casey* v. *United States*, 276 U.S. 413 (1928), decided two months before *Olmstead*, to *Russell* v. *United States*, —— U.S. —— (1973), 41 L.W. 4538, decided this year, the Court has steadfastly refused to rule that governmental participation in a crime necessarily vitiates the conviction of private individuals who took part in committing the offense. In *Casey*, the Court affirmed (per Mr. Justice Holmes) a conviction in a case where federal narcotics officers induced prisoners to request their attorney to supply them with narcotics for which the prisoners paid with sums advanced by the Government. Only Justices Brandeis and Butler dissented on the grounds of the Government's conduct. Yet *Casey*, like other entrapment cases where the Government has prevailed, is distinguishable from this case in several respects. In *Casey* the jailer suspected that a federal crime was being committed by a specific individual; there, as far as appears, the instigators of the scheme had only a generalized belief that something was rotten in the Queens County District

[3] Mr. Justice Butler, who joined in the portion of the dissent relating to the Fourth Amendment, thought the "dirty business" issue was not properly before the Court, 277 U.S. at 486.

Attorney's office. Furthermore, in *Casey*, as in the more common cases where federal undercover agents have induced the sale of narcotics, the criminal activity in which the Government agents participated was the very activity for which the defendant was prosecuted. Finally, in cases of that sort, the Government agents have actually not committed a crime at all since they have had no criminal intent.[4] In this case, by contrast, the Government "authorized" Barone and Murano to engage in crimes under New York law,[5] several of them prior to the discovery of any criminal activity on the part of the defendants and quite independent of the crimes the defendants committed.

The Government relies heavily on the recent decision in *United States* v. *Russell, supra*, where the Court reaffirmed the "subjective" view of the entrapment defense taken by the majority in *Sorrells* v. *United States*, 287 U.S. 435 (1932), and repeated in *Sherman* v. *United States*, 365 U.S. 369 (1958). By a 5-4 vote, the Court rejected the contention that the entrapment defense should focus primarily on the propriety of police behavior in inducing the defendant to commit a crime. The Ninth Circuit in *Russell* had reversed the defendant's conviction for illegally manufacturing methamphetamine because the Government agent had supplied Russell with the essential chemical ingredient required for producing the drug. This behavior, the court wrote, constituted "an intolerable degree of governmental

[4] There are, of course, cases where agents intend to keep some or all of the purchased narcotics and make a later sale, but the government obviously is not a party to that intent.

[5] The Government argues that no one was hurt by the state crimes committed by Bario and Murano since in fact there had been no actual violation of New York's gun law, Penal Law § 265.05. The Government would distinguish this case from one where federal agents were instructed to deny a state crime that had in fact been committed. In its view the waste of the time of New York police officers, judges and grand jurors in considering a fictitious crime was more than counter-balanced by the results achieved.

participation in the criminal enterprise." 459 F.2d at 673. In reversing, Mr. Justice Rehnquist wrote for the Court that at least in drug-related offenses, "infiltration of drug rings and a limited participation in their unlawful present practices" is permissible, as it is "the only practicable means of detecton. —— U.S. at ——, 41 L.W. at 4540. Moreover, the Court, pointed out that in *Russell* the Government agent had violated no independent constitutional right of the defendant and, by merely providing the ingredients for the illegal process, he did not violate any federal statute or commit any crime. Finally, in holding that entrapment takes place only when the government's deception "actually implants the criminal design in the mind of the defendant," the Court admonished that the defense "was not intended to give the federal judiciary a 'chancellor's foot' veto over law enforcement practice of which it did not approve." —— U.S. at ——, 41 L.W. at 4541.

The defendants have attempted to distinguish *Russell* on the ground that there the Government's participation in the criminal enterprise was limited, while here it was pervasive. They point particularly to Mr. Justice Rehnquist's *caveat*, —— U.S. at ——, 41 L.W. at 4540, that the Court might "some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, cf. *Rochin* v. *California*, 342 U.S. 165 (1952) . . ." The Government responds that the citation of *Rochin*, where the Court, under the due process clause, set aside a state conviction because of police conduct involving "[i]llegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents," 342 U.S. at 172, shows that Mr. Justice Rehnquist was thinking of conduct *directed at the defendants* which shocked the conscience of the Court even though it did not come within

any "specific" of the Bill of Rights. No such "direct and immediate infringement of the rights of a defendant" occurred here, the Government insists.

We are not sure how we would decide this question if decision were required. Our intuition inclines us to the belief that this case would call for application of Mr. Justice Brandeis' observation in *Olmstead*. Even though, that view has not been incorporated in the entrapment defense, there is certainly a limit to allowing governmental involvement in crime.[6] It would be unthinkable, for example, to permit government agents to instigate robberies and beatings merely to gather evidence to convict other members of a gang of hoodlums. Governmental "investigation" involving participation in activities that result in injury to the rights of its citizens is a course that courts should be extremely reluctant to sanction. Prosecutors and their agents naturally tend to assign great weight to the societal interest in apprehending and convicting criminals; the danger is that they will assign too little to the rights to citizens to be free from government-induced criminality.

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[6] While some passages in *Russell* strongly suggest that courts should abstain from overturning convictions because of law enforcement tactics that do not appeal to them, see — U.S. at —, 41 L.W. at 4541, the Court made it clear that the entrapment defense would not be the only means for a defendant to contest the propriety of police practices utilized to apprehend him. Besides the reference to *Rochin*, the Court noted that law enforcement practices would remain subject to "constitutional and statutory limitations and to judicially fashioned rules to enforce those limitations." *Id.* It is doubtful, however, that the constitutional principles in this area will be any less "unmanageably subjective" than the entrapment decisions Mr. Justice Rehnquist criticized. In his concurring opinion in *Williamson* v. *United States*, 311 F.2d 441, 445 (5 Cir. 1962), the celebrated "contingent-fee informer" case, Judge Brown gave vent to the frustration of trying to draw lines between permissible and impermissible forms of undercover activity: "What we hold is that, recognized as in the role of informer in the enforcement of criminal laws, there comes a time when enough is more than enough—it is just too much."

In this case the Government argues, its conduct did not infringe the right either of the defendants or of any third parties; see fn. 5. Yet the Government agents displayed an arrogant disregard for the sanctity of the state judicial and police processes. The investigators apparently permitted their deserved contempt for corrupt practitioners in the Queens criminal justice system to spill over into disdain for all the participants in the system—including the police, the courts, and the members of the grand jury, all of whom were subjected to the Government's fabrications. While this pattern of deception may be less serious than some forms of governmental participation in crime that can be hypothesized, it is substantially more offensive than the common cases where government agents induce the sale of narcotics in order to make drug arrests.

Since we conclude reversal to be required on another ground, we leave the resolution of this difficult question for another day. We hope, however, that the lesson of this case may obviate the necessity for such a decision on our part.

III.

We take a similar view with respect to the question whether this prosecution should be dismissed because the initiation of the investigation was founded on a grossly inflated conception of the role of the federal criminal law. There is no evidence that, at the time of the February 1972 meeting, the federal law enforcement officers had any information that the supposed corruption of the Queens County District Attorney's office involved violations of the Travel Act, 18 U.S.C. § 1952;[7] the hope was rather that if

[7] Subsequent to oral argument, the Government informed us by letter that the United States Attorney's Office had "advised a high New York State Court official of the investigation, the need therefor, and the techniques to be employed in the undercover arrest of a federal agent," although conceding that not "all facets of the investigation as they later developed were communicated to the court." But it is not for an unnamed state court official to determine the proper scope of federal law enforcement.

the playing of the Bario-Murano scenario would induce corrupt activity, some interstate or foreign element might occur or, if not, might be injected.[8] Today there is widespread concern whether the federal criminal law has not outrun reasonable bounds; "Federal auxiliary criminal jurisdiction" has spread to the point where "[t]here is practically no offense within the purview of local law that does not become a Federal crime if some distinctive Federal involvement happens to be present." See N. Abrams, Consultant's Report on Jurisdiction, 1 Working Papers of the National Commission on Reform of Federal Criminal Laws, 33, 36 (1970). Although § 207 of the Commission's Proposed Code, entitled "Discretionary Restraints on Exercise of Concurrent Jurisdiction," includes among the cases where "a substantial federal interest exists," the instance in which "state or local law enforcement has been so corrupted as to undermine its effectiveness substantially," it is not clear that comprehends a case where federal investigators have no reason to suspect any violation of federal law. Even if the proposed code section was intended to cover such cases, we are not sure we would agree that the federal interest should extend that far.

While responsibility for keeping federal criminal investigations and prosecutions within the bounds appropriate on the assumptions inherent in a federal system should rest, in the first instance, with United States Attorneys under the active guidance of the Attorney General, see Friendly, Federal Jurisdiction: A General View 55-61

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[8] Counsel for the Government suggested at argument and repeated in the letter mentioned in fn.7 that corruption in any local prosecutor's office provides a safe harbor for organized crime, which almost inevitably crosses state lines. While this may be so, the proper course for federal officers would seem to be to aim the investigation at the organized crime. In this case the Government alleges only that it was aware of "the existence of corruption in high places," and not who was engaged in it or whether it involved any interstate activity whatsoever.

(1973); we are not prepared to say that, absent Congressional limitation, a federal court may never dismiss a prosecution as an abuse of federal power, see Hart & Wechsler, The Federal Courts and the Federal System 1287 (2d ed. 1973). However, we find it unnecessary to decide whether we have such a power or should exercise it here, since we hold these convictions must be reversed on another, although not unrelated, ground.

IV.

In determining whether the three interstate or foreign telephone calls in this case sufficed to trigger application of the Travel Act, it is well to have the language of the statute before us; we have reproduced the pertinent portion in the margin.[9]

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[9] INTERSTATE AND FOREIGN TRAVEL OR TRANSPORTATION IN AID OF RACKETEERING ENTERPRISES.

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or controlled substances (as defined in section 102(6) of the Controlled Substances Act) or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

One is immediately struck by the excess of the spread of the language of the statute over the title. The title refers only to interstate and foreign travel or transportation; yet the text also includes the use of any facility in interstate or foreign commerce. The title refers only to acts "in aid of racketeering enterprises"; yet the definition of "unlawful activity" in the text displays no such limitation. The legislative history affords little indication of Congressional awareness of the enormous reach the statute could have if literally interpreted. Indeed, there is even some evidence that Congressional inadvertence contributed to the expansion in the scope of the Act as it made its way through the House and Senate committees, see fn. 10 *infra*.

The source of the statute, which was adopted with remarkable speed and little discussion, was a bill forwarded to Congress by Attorney General Kennedy on April 6, 1961. His letter of transmittal urged that:

> Because many rackets are conducted by highly organized syndicates whose influence extends over State and National borders, the Federal Government should come to the aid of local law enforcement authorities in an effort to stem such activity.

87th Cong. 1st Sess., S. Rep. No. 644 at p. 4, H.R. Rep. No. 966, reprinted in 2 U.S. Code Cong. & Adm. News 2664, 2666 (1961). He told the Senate Judiciary Committee that the Act was necessary to aid local law enforcement officials in many instances where "the 'top men' of a given criminal operation resided in one State but conducted their illegal activities in another." Hearings on S. 1653-1658, S. 1665 before the Senate Judiciary Committee on the Attorney General's Program to Crush Organized Crime and Racketeering, 87th Cong. 1st Sess. (1961) at 15-17, quoted in *Nardello* v. *United States*, 393 U.S. 286, 290-91 (1969). The target of the Act, he said, "clearly is organized crime." The statute would not curtail "the

sporadic, casual involvement in these offenses, but rather a continuous course of conduct sufficient for it to be termed a business enterprise." S. Rep. No. 644, at 3. See *Rewis* v. *United States*, 401 U.S. 808, 811-12 n. 6 (1971). In his testimony before the House committee, the Attorney General "cited numerous instances of the use of the facilities of interstate commerce by racketeers and hoodlums to promote the illegal enterprises, to distribute the proceeds among the syndicate members of illegal gambling, liquor, narcotics, and prostitution businesses and the use of the facilities for the commission of crimes of violence in furtherance of the unlawful activities." H.R. Rep. No. 966, 2 U.S. Code Cong. & Adm. News, *supra* at 2665. Yet the bill he submitted, if read literally, would cover a $10 payment to fix a traffic ticket if only the person desiring the fix walked across a state line to pay off the policeman.

The Senate did nothing to narrow the language to the stated purpose. 107 Cong. Rec. 13942-44 (1961). The House tried to do so by amending what is now § 1952(b)(2) to read "extortion or bribery *in connection with such offenses*" (emphasis supplied), to wit, gambling, liquor, narcotics or prostitution offenses "in violation of the laws of the State in which they are committed or of the United States." H.R. Rep. No. 966, 2 U.S. Code Cong. & Adm. News, *supra* at 2667. But the Senate, responsive to an objection from the Department of Justice "that the House amendment would eliminate offenses such as 'shakedown rackets', 'shy-locking' and labor extortion which were traditional sources of income for organized crime," *Nardello* v. *United States*, *supra*, 393 U.S. at 292, refused to agree to the change; the House Managers yielded, 107 Cong. Rec. 18814-15 (1961), and the bill was adopted in substantially its present form.[10]

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[10] Possibly through inadvertence, the House substantially increased the scope of the Travel Act during its rush toward passage. The original bill, as submitted by the Attorney General, covered

It would go beyond the proper exercise of judicial power for courts to confine the Travel Act to its title, see *Fraser* v. *United States*, 145 F.2d 139, 142 (6 Cir. 1944), *cert. denied*, 324 U.S. 849 (1945), or even to the precise purpose stated to Congress by the Attorney General. Nonetheless, the question remains whether the defendants here have used a facility in interstate or foreign commerce, for the purposes listed in § 1952(a)(3), in a sufficiently meaningful way to subject themselves to liability under the statute. In deciding that limited issue, we are free, indeed bound, to look to the legislative history, to consider the demands

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only interstate and foreign *travel*. At the urging of Senator Keating, the Senate Judiciary Committee added a section covering *transportation* in interstate and foreign commerce. The Senate Committee also revised the title to its current form to reflect the change, S. Rep. No. 644, at 1, 4, and the Senate passed the bill in that form. In attempting to tidy up the language of the bill, however, the House Committee expanded its scope considerably. Purporting merely to combine the two sections of the Senate bill into a single section, the House Committee substituted the present language extending the coverage of the Act to "whoever *travels* in interstate commerce or *uses any facility* in interstate commerce, including the mail . . . ." The Committee demonstrated its unawareness of the significance of the alteration by reporting that the amendment made "no substantive change in the provisions of the bill" and by retaining the Senate's more restrictive title. H.R. Rep. No. 966, 2 U.S. Code Cong. & Adm. News, *supra* at 2664. The conference committee failed to catch the change; it agreed to the House's amendment because of the cosmetic value of adding a single streamlined section to title 18 rather than two cumbersome, largely repetitive ones. H.R. Rep. No. 1161, 107 Cong. Rec. 18814-15 (1961). In construing § 1952, the courts have perforce read the statutory language to mean just what it seems to mean, and have uniformly applied the Travel Act to interstate telephone calls as well as interstate travel and transportation. See, *e.g.*, *United States* v. *Armiento*, 445 F.2d 869 (2 Cir.), *cert. denied*, 404 U.S. 853 (1971); *Menendez* v. *United States*, 393 F.2d 312 (5 Cir. 1968), *cert. denied*, 393 U.S. 1029 (1969); *McIntosh* v. *United States*, 385, F.2d 274 (8 Cir. 1967). However, the legislative background at least indicates that Congress did not regard the use of interstate facilities for purposes other than travel or transportation as among the central targets of the Act.

of federalism, and to heed the venerable rule, reaffirmed by the Supreme Court with respect to this very statute, that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis* v. *United States, supra,* 401 U.S. at 812.

While the precise holding of *Rewis* was that the proprietors of a Florida gambling establishment did not violate the Travel Act merely because some of their customers came from Georgia, a course of action foreseeable and even designed, the opinion indicates that the Act is not to be stretched to the limits of its language. The Court stated, 401 U.S. at 811, that the legislative history revealed "that § 1952 was aimed primarily at organized crime and, more specifically, at persons who reside in one State while operating or managing illegal activities located in another." The warnings that "Congress would certainly recognize that an expansive Travel Act would alter sensitive federal-state relationships" and "could overextend limited federal police resources," 401 U.S. at 812, are not without relevance here. These observations were reiterated in *Erlenbaugh* v. *United States,* 409 U.S. 239, 247 n. 21 (1972).

Of our own decisions under the Travel Act, the most illuminating for present purposes is *United States* v. *Corallo,* 413 F.2d 1306 (2 Cir.), *cert. denied,* 396 U.S. 958 (1969). Although that case, like this one, involved corruption of a local official, the evidence there disclosed numerous telephone calls from New York to Connecticut for the very purpose of arranging the bribe and distributing the proceeds among the conspirators, 413 F.2d at 1315. On that basis Judge Medina concluded, 413 F.2d at 1325, that "the extensive references in the record to interstate telephone calls that were actually made justify the inference that the use of interstate telephone calls was not a casual and incidental occurrence but the fulfillment of an integral part of the conspiratorial consensus." In *United States* v. *DeSapio,* 435 F.2d 272 (2 Cir. 1970), *cert. denied,* 402 U.S. 999 (1971), the interstate acts were much less numerous,

see 435 F.2d at 275-76, 278, but one of them, the meeting at Fried's horsefarm, which was reached by interstate travel at his suggestion, was the occasion when, on the Government's proof, the entire conspiracy was hatched.[11] In *United States* v. *Cassino*, 467 F.2d 610, 613-14 (2 Cir. 1972), *cert. denied*, —— U.S. —— (1973), 41 L.W. 3447, several of the conspirators engaged in weekly travel from New York to New Jersey for meetings in furtherance of the conspiracy. Finally, in our most recent encounter with the Travel Act, *United States* v. *Kahn*, 472 F.2d 272, 285 (2 Cir. 1973), where there was extensive interstate travel and use of the mails, Judge Smith distinguished *Rewis* and the Seventh Circuit decisions cited below on the ground that in them "the defendants themselves engaged in no interstate activities, and that the total interstate travel aspect of the enterprises was either marginal or unforeseen."

Of the other circuits the Seventh has had most to say concerning how purposeful and important to the enterprise the use of interstate facilities must be. *United States* v. *Altobello*, 442 F.2d 310 (7 Cir. 1971), held it was not enough that a Philadelphian who was the victim of extortion in Chicago gave as part payment the proceeds of a check he cashed on a Philadelphia bank, which cleared through the mails.[12] In *United States* v. *McCormick*, 442

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[11] Examination of the briefs in the *DeSapio* appeal confirms the writer's recollection that no issue concerning the applicability of the Travel Act was raised. This was also true in *United States* v. *Pordum*, 451 F.2d 1015 (2 Cir. 1971), *cert. denied*, 405 U.S. 998 (1972).

[12] The Fourth Circuit cases seem contra on this point. *United States* v. *Salsbury*, 430 F.2d 1045 (4 Cir. 1970), held that cashing out-of-state checks, with knowledge that they would be cleared through the mails was sufficient to invoke the statute. This followed the earlier decision in *United States* v. *Weehsler*, 392 F.2d 344 (4 Cir.), *cert denied*, 392 U.S. 932 (1968) ("When one deposits a check, there would seem to be little doubt that he is using a facility in interstate commerce." *Id.* at 347 n.3.).

F.2d 316, 318 (7 Cir. 1971), an Indiana lottery operator advertised in a local newspaper for salesmen, and some copies of the newspaper were mailed out of the state. The court again refused to permit application of the Travel Act finding that "the activities engaged in by defendant were essentially local" and that the role played by the interstate mailings was "a matter of happenstance" and "minimal and incidental" to the operation of the illegal lottery. The decision in *United States* v. *Lee*, 448 F.2d 604, 607 (7 Cir. 1971), cited by the Government, indicates no contrary view; in that case employees of an Indiana gambling establishment regularly crossed state lines, and the court distinguished both *Altobello* and *Rewis* by pointing to the "continual interstate travel by employees of the illegal venture." Two cases from other circuits holding the interstate aspect insufficient are *United States* v. *Hawthorne*, 356 F.2d 740 (4 Cir.), *cert. denied*, 384 U.S. 908 (1966) [moving self and family from Indiana to West Virginia where illegal gambling enterprise was to be undertaken]; and *United States* v. *Judkins*, 428 F.2d 333 (6 Cir. 1970) [calls from Arkansas to appellant's house to prostitution in Tennessee not shown to have a business purpose].

It is with this background that we consider the three telephone calls which the Government claims to have brought this case within 18 U.S.C. § 1952(a)(3).

We begin by discarding Klein's return of Bario's calls from Newark on the morning of April 27. Whatever Congress may have meant by § 1952(a)(3), it certainly did not intend to include a telephone call manufactured by the Government for the precise purpose of transforming a local bribery offense into a federal crime. In view of the totally fabricated nature of this episode, it is immaterial that Klein returned the call rather than receiving it as the Government had plotted. The Government's reliance on *United States* v. *Edwards*, 366 F.2d 853, 867-68 (2 Cir. 1966), *cert. denied*, 386 U.S. 908 (1967), is misplaced. There

this court found that the participants "never considered themselves limited by New York boundaries" and indeed had suggested that the stolen securities be disposed of outside New York; moreover, the issue of the manufacture of federal jurisdiction had not been raised at trial. It is not a sufficient answer that if the issue here were simply one of entrapment, the jury would have been justified in finding, under the entirely correct instruction on the subject given by the judge, that Klein had a propensity for crime, requiring no encouragement from the federal agents. Our holding is rather that when Congress responded to the Attorney General's request to lend the aid of federal law enforcement to local officials in the prosecution of certain crimes, primarily of local concern, where the participants were engaging in interstate activity, it did not mean to include cases where the federal officers themselves supplied the interstate element and acted to ensure that an interstate element would be present. Manufactured federal jurisdiction is even more offensive in criminal than in civil proceedings, cf. 28 U.S.C. § 1359. As the late Judge Freedman said with respect to civil actions in *McSparran* v. *Weist*, 402 F.2d 867, 873 (3 Cir. 1968) (*en banc*), *cert. denied*, 395 U.S. 903 (1969), manufactured jurisdiction "is a reflection on the federal judicial system and brings it into disrepute."

Similar considerations lead us to reject the Government's reliance on Wasserberger's unsuccessful attempts to reach Bario in Las Vegas. Those calls also resulted from a plant by the Government—in this instance a plant of misinformation which provoked interstate telephone calls that Wasserberger would not otherwise have made.[13] An addi-

[13] The Government contends that Bario gave Wasserberger the Sahara Hotel information "only after great pressure by Wasserberger and Klein to furnish a number." According to Bario's testimony, however, when Klein requested a number to call, Bario said that Wasserberger would know how to get in touch with him, and

tional ground for ruling out the abortive Las Vegas calls is that there was not and, under the circumstances, could not have been any actual use of a facility in interstate commerce which would in fact promote, etc., any unlawful activity. When Bario told Wasserberger that he could be reached at the Sahara Hotel, he knew that any attempt to reach him at the hotel would be frustrated. We refuse to construe the "intent" language of § 1952 so broadly as to include a call to an innocent telephone operator who had not the faintest idea of what was afoot.[14]

We are thus left only with Bario's call from Paris on April 25. That call was not planted in the sense that the Newark call was; the Government did not send Bario abroad for the sole purpose of making a foreign call. But, apart from the question, which we leave unresolved, whether a communication with an undercover agent can ever meet the requirement of § 1952(a), the Paris call rather precisely fits Judge Medina's characterization in *United States* v. *Corallo, supra,* 413 F.2d at 1325, of "a casual and incidental occurrence" and Mr. Justice Marshall's reference in *Rewis, supra,* 401 U.S. at 812, to "a matter of happenstance." The call served no purpose that would not have been equally served by a call from New York; the most that can be said is that when the defendants made their despicable agreement with Bario, they

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when Wasserberger asked for a number, Bario readily spun out the tale about leaving messages at the Sahara Hotel. Since the Government's assertion that the hotel story was invented "solely to maintain the credibility of Agent Bario as a Las Vegas mobster" is nowhere supported in the record, we need not decide whether the considerations mentioned in this footnote would lead to a different result if factually sustained.

[14] We do not mean the foregoing to be taken as indicating that we would reach a different conclusion with reference to the Las Vegas calls if the operator had passed them on to Bario; we simply need not decide that issue.

were told he might be calling from across the Atlantic rather than the East River—a matter of complete indifference to them. Beyond all this is the question whether the *receipt* of an interstate or foreign telephone call, in no way initiated by a defendant, event though expected by him, is any more a violation of the Travel Act than the reception of Georgia gamblers by the Florida operators in *Rewis, supra,* 401 U.S. 808. In light of the principles controlling our decision, which we summarized at the conclusion of our discussion of the legislative history of the Travel Act, we hold that the Paris call was insufficient to transform this sordid, federally provoked incident of local corruption into a crime against the United States.

The convictions are reversed for insufficiency of the evidence to show a violation of, or a conspiracy to violate, the Travel Act, with instructions to dismiss the indictment.

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In the Supreme Court of the United States

OCTOBER TERM, 1973

JESSE S. BAGGETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 481 F. 2d 114.

JURISDICTION

The judgment of the court of appeals was entered on June 19, 1973. A petition for rehearing was denied on July 26, 1973. The petition for a writ of certiorari was filed on August 24, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's criminal enterprise involved sufficient interstate activity to violate the Travel Act, 18 U.S.C. 1952.

2. Whether the admission in evidence of testimony relating to conduct for which petitioner had been acquitted in a state court was reversible error.

3. Whether the trial court erroneously limited the scope of cross-examination of a government witness concerning a serious physical ailment which he suffered.

STATEMENT

After a jury trial in the United States District Court for the District of Maryland, petitioner was convicted of violating 18 U.S.C. 1952 by causing the interstate movement of a $3,500 check with intent to commit bribery. He was sentenced to imprisonment for fifteen months and fined $5,000. The court of appeals affirmed (Pet. App.).

The evidence shows that from 1954 to 1970 petitioner was a member—and from late 1964 until 1970 the Chairman—of the Board of County Commissioners of Prince George's County, Maryland. Among the responsibilities of the five-member Board was finally deciding (subject only to judicial review for arbitrariness) all applications to rezone land (Oct. 6 Kahler Tr. 62-64).[1]

During the period involved in this case, from approximately 1962 to 1968, Prince George's County experienced rapid growth. A number of land developers and speculators attempted to enhance the value

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[1] The transcript of trial, filed with the Clerk of this Court, consists of separately paginated volumes from October 5-8, 1971, continuously paginated volumes for the remainder of the evidentiary portion of the trial (to October 22, 1971), and separately paginated volumes for the closing arguments, instructions, and jury verdict. Volumes which are separately paginated will be identified by the name of the witness; volumes which are continuously paginated will be identified solely by "Tr."

of their tracts by obtaining rezoning from a rural classification to one which permitted construction of higher-density structures. The process of rezoning began with a review by the Park and Planning Commission, whose advisory opinion would then be given to the County Commissioners. Following a public hearing, the Commissioners would rule on the rezoning application (Oct. 6 Kahler Tr. 52-64).

While petitioner served on the Board of County Commissioners, he solicited and accepted numerous favors from individuals who had zoning applications pending before the Park and Planning Commission or the Board of County Commissioners (Oct. 8 Tessitore Tr. 15-33; Tr. 47-61, 135-136, 272, 278, 303, 308). Among those who bestowed favors upon him were co-defendant Ralph Rocks, a builder and land developer,[2] and William Kahler, an attorney who handled all of the applications for rezoning submitted by the corporations controlled by Rocks (Oct. 6 Kahler Tr. 51). Petitioner was treated to six Florida vacations by Rocks and Kahler. From 1963 to 1966, while petitioner's friend, William J. Stevens, was Chairman of the Park and Planning Commission, Stevens accompanied petitioner on these free trips. When his term of office expired and he was not re-appointed, Stevens no longer was invited (Oct. 8 Stevens Tr. 8, 32-33, 45-47). Most of the trips occurred shortly after either the Board of County Commissioners or the Park and Planning Commission had taken actions favorable to Rocks (Oct. 6 Kahler Tr. 140-146; Oct. 7 Kahler Tr. 4-79).

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[2] Tried separately, Rocks was convicted of violating 18 U.S.C. 1952. Following affirmance of the conviction by the court of appeals, Rocks filed a petition for a writ of certiorari, No. 73-116, which the government has opposed.

Petitioner owned a large farm in Calvert County, Maryland. In December 1963, he negotiated with the sales manager of Ungar Equipment Company, Harwood, Maryland, for the purchase of a new tractor and accessory equipment for $3,500. Petitioner directed the manager to prepare the sale invoice in the name of Rocks Engineering Company (Oct. 6 Fiedler Tr. 12). The tractor and accessory equipment were delivered to petitioner's farm, where they remained for petitioner's private use (Oct. 5 Chapman Tr. 4; Oct. 5 Monnie Tr. 3-21). On Wednesday, December 23, 1963, a check for $3,500 payable to Ungar Equipment Company was prepared at the Washington, D.C. office of the Rocks Engineering Company and signed by Rocks (Oct. 5 Martin Tr. 10-11, 18-19; Oct. 6 Stacey Tr. 14-15; Govt. Exh. 1). Three days later, petitioner appeared at the Ungar Equipment Company office and used the unendorsed check to pay for his tractor (Oct. 5 Sutton Tr. 27, 37-38). The original invoice was never found in the files of the Rocks Engineering Company. When, in 1969, the Internal Revenue Service inquired about this transaction, the comptroller for Rocks Engineering had to obtain a photostatic copy of the invoice from Ungar Equipment Company (Oct. 5 Martin Tr. 12-18; Oct. 6 Hungerford Tr. 6-7). It was the transaction involving the $3,500 check which was the subject matter of the prosecution under 18 U.S.C. 1952.

ARGUMENT

1. Pointing to the absence of direct proof that petitioner crossed a state line to obtain the check from Rocks Engineering Company, petitioner argues that his conduct was essentially local and therefore

did not violate the Travel Act. 18 U.S.C. 1952.[3] A similar contention has been made in the petition for a writ of certiorari filed by co-defendant Rocks (No. 73-116; see no. 2).[4] However, the bribe of petitioner involving the $3,500 check did entail a significant use of facilities in interstate commerce. It was clearly established that the check drawn by Rocks in the District of Columbia and used by petitioner in Maryland, itself physically moved interstate. While the evidence does not indicate whether petitioner personally moved it or himself arranged the details of its movement, he was

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[3] 18 U.S.C. 1952 provides, in pertinent part:

(a) Whoever travels in interstate * * * commerce or uses any facility in interstate * * * commerce, including the mail, with intent to-

(1) distribute the proceeds of any unlawful activity; or

* * * * *

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1) * * * and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section, "unlawful activity" means * * * extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

[4] As we have indicated in our response to Rocks' petition (a copy of which is being served on petitioner), the numerous trips to Florida and elsewhere demonstrated that interstate movement was a signficant characteristic of the corrupt relationship between petitioner and Rocks or Kahler. The evidence at petitioner's trial also established that he was a frequent visitor to the District of Columbia office of Rocks Engineering (Oct. 5 Martin Tr. 43-44). Thus, the single instance of the $3,500 check charged in the indictment was not an isolated interstate occurrence in an otherwise wholly intrastate criminal enterprise.

a participant with Rocks in an illegal bribery scheme pursuant to which the check was moved via facilities of interstate commerce and is therefore legally responsible for its movement from Rocks to him. *United States* v. *Lee*, 448 F. 2d 604 (C.A. 7), certiorari denied, 404 U.S. 858; *United States* v. *Salsbury*, 430 F. 2d 1045 (C.A. 4); *United States* v. *Wechsler*, 392 F. 2d 344 (C.A. 4), certiorari denied, 392 U.S. 932.

The three cases primarily relied upon by petitioner, *Rewis* v. *United States*, 401 U.S. 808, *United States* v. *Archer*, decided July 12, 1972 (C.A. 2),[5] and *United States* v. *Altobella*, 442 F. 2d 310 (C.A. 7), have been distinguished in our brief opposing certiorari in Rocks, No. 73-116 (Br. in Opp. 15-17).[6] We rely on that discussion here, adding only that, as the Second Circuit made clear in an opinion in response to the government's petition for rehearing in *Archer* (a copy of which is attached hereto as an appendix), the holding in that case is confined to the situation in which the sole interstate activity involves an undercover law enforcement officer, which is not the case here.

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[5]Supplemental Brief in Support of Petition, App. 1a-23a.

[6]The Seventh Circuit, which decided *Altobella*, reached a similar conclusion a month later in *United States* v. *McCormick*, 442 F. 2d 316, upon which petitioner also relies, involving the use of a local newspaper to advertise an illegal lottery, where the only connection with interstate commerce was the fact that the newspaper had an out-of-state circulation of less than 500.

Petitioner also argues that the government has not shown a connection with organized crime (Pet. 12). But such a connection is not a requisite to violation of the Travel Act. See *United States* v. *Roselli*, 432 F. 2d 879, 884-886 (C.A. 9), certiorari denied, 401 U.S. 924. Petitioner also contends that the district judge should have instructed the jury that it must find that he intended to use an interstate facility and knew that he was using one (Pet. 13). Contrary to his contention, however, the Fourth Circuit in *Salsbury*, *supra*, did not decide whether such intent and knowledge were elements of the offense, and other courts have rejected petitioner's position. *United States* v. *Roselli*, *supra*, 432 F. 2d at 891; *United States* v. *Hanon*, 428 F. 2d 101, 108 (C.A. 8), certiorari denied, 402 U.S. 952; *United States* v. *Miller*, 379 F. 2d 483 (C.A. 7); see *United States* v. *De Cavalcante*, 440 F. 2d 1264, 1268 (C.A. 3); *United States* v. *Blassingame*, 427 F. 2d 329 (C.A. 2), certiorari denied, 402 U.S. 945. These cases correctly hold that the government need prove only that petitioner intended to engage in an unlawful activity.

2. In 1967 petitioner had been acquitted in a state court of a charge that he accepted a bribe from Daniel Tessitore, a home builder in Prince George's County, who alleged that, while a zoning application was pending, the local police chief had advised him that he was expected to help construct an addition to petitioner's home. The work was begun two days after the (up to then) long delayed zoning application was approved; Tessitore did not request payment for his work nor did he receive it.

At petitioner's federal trial, the court permitted the government to use Tessitore as a witness for the limited purpose of showing intent and pattern of conduct (Oct. 8 Tessitore Tr. 4-26). Later, the defense was permitted to read to the jury the state court's verdict and opinion (Tr. 1281-1283). In its closing charge, the court dealt at length with the limited manner in which the jury would be permitted to consider the Tessitore transaction and other evidence of acts of misconduct not charged, indicating specifically that, as to the Tessitore matter, the jury could also take into consideration the not guilty verdict (Oct.27 Instructions, Tr. 18-21).

In this Court petitioner, invoking the doctrine of collateral estoppel, claims that the government should not have been allowed to use Tessitore's testimony against him in view of the previous acquittal in the Maryland court. However, the collateral estoppel rule does not apply to this situation. In *Ashe* v. *Swenson,* 397 U.S. 436, 443, this Court defined "collateral estoppel" to mean that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." The federal government was not a party to the state trial. The state acquittal could no more bar the use of Tessitore's testimony at the federal trial than it would bar prosecution for the identical offense of which petitioner had been acquitted, if the same conduct had also violated federal law. See *Abbate* v. *United States,* 359 U.S. 187; *Bartkus* v. *Illinois,* 359 U.S. 121; *United States* v. *Smith,* 446 F. 2d 200 (C.A. 4); *United States* v. *Synnes,* 438 F. 2d

764 (C.A.), vacated on other grounds, 404 U.S. 1009[7] Petitioner presents no persuasive reason to discard the "dual sovereignty" doctrine in the present context.

In any event, the Tessitore incident was only one of several introduced for the limited purpose of showing petitioner's state of mind and pattern of conduct. In light of the other abundant evidence on this matter, coupled with the jury's awareness that petitioner had been acquitted in the state court of bribery arising from Tessitore's gratuitous work, the introduction in evidence of testimony relating to the Tessitore matter, if error, was harmless beyond a reasonable doubt. See *Harrington* v. *California,* 395 U.S. 250; *Chapman* v. *California,* 386 U.S. 18.

3. At trial, William Stevens, the former Park and Planning Commission Chairman, testified as a government witness and revealed that he was then serving a sentence for income tax evasion and was confined at the Federal Medical Center, Springfield, Missouri. He also indicated that the government had agreed not to oppose his motion for a reduction of sentence if he testified truthfully. On cross-examination, counsel attempted to elicit testimony that Stevens was suffering from a cancer known as Hodgkin's disease. Defense counsel told the court that his purpose was to show that Stevens was in such a debilitated condition, ostensibly from being deprived of medicine when he made his agreement with the government, that one might infer that he had been "pressured to testify to things that are simply not accurate." (Oct. 8

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[7] *Wingate* v. *Wainwright,* 464 F. 2d 209 (C.A. 5), relied upon by petitioner, does not involve different sovereignties and is therefore inapposite. See *id.* at 213, n. 3.

Stevens Tr. 101). The court rejected counsel's request, indicating that the crucial issue was whether the witness was telling the truth at trial. The court agreed to allow counsel to ask the witness about his present medication and alertness, but would not allow the nature of the disease to be revealed, because it might evoke undue sympathy on behalf of the witness.

Counsel conducted a brief inquiry into Stevens' medication along the lines permitted by the court and then closed his cross-examination. The questioning did not produce any suggestion that Stevens felt that he was being coerced into serving as a government witness. Nor did counsel ever substantiate his conjectural claim of pressure arising from deprivation of medicine. Nothing occurring during this incident warrants further review of the conclusion of the courts below that the right of cross-examination was not impaired by the exercise of the trial judge's "full discretion in limiting the nature and scope of cross-examination." *United States* v. *Polakoff*, 439 F. 2d 1113 (C.A. 5).

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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NOVEMBER 1973.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1039—September Term, 1972.
1040
1041

Decided September 26, 1973.

Docket Nos. 73-1527
73-1528
73-1711

UNITED STATES OF AMERICA,

Appellee,

v.

NORMAN ARCHER, FRANK R. KLEIN and LEON WASSERBERGER,

Defendants-Appellants.

Before:

FRIENDLY, FEINBERG and MANSFIELD,

Circuit Judges.

ON PETITION FOR REHEARING

PAUL J. CURRAN, United States Attorney for the Southern District of New York (Rudolph W. Giuliani, John W. Nields, Jr., and John D. Gordan III, Assistant United States Attorneys), *for Appellee.*

MAURICE H. NADJARI, Deputy Attorney General (Peter J. O'Connor, Special Assistant Attorney General), *for the Office of Special Prosecutor, State of New York, amicus curiae.*

FRANK S. HOGAN, District Attorney, New York County (Alfred J. Scotti, Chief Assistant District Attorney, and Michael R. Juviler, Assistant District Attorney), *amicus curiae.*

MICHAEL ARMSTRONG, District Attorney, Queens County, *amicus curiae.*

PER CURIAM:

Beginning with a nine-page description of the background alleged to have justified its setting up the crime with which defendants were charged, the Government attacks both what it characterizes as dicta in our opinion and the precise holding that the use of interstate and foreign telephone facilities in this case did not suffice to bring the defendants within the Travel Act.

Although the record does not contain proof of many of the facts now called to our attention by the Government for the first time as evidence of the background of its investigation, we do not question that the federal prosecutors had been given abundant information about the widespread fixing of cases in the Queens County District Attorney's office,[1] some of which, we are now told, may have

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1 This came in principal part from a commission established in 1970 by Mayor Lindsay of New York City and chaired by Whitman Knapp, Esq., a distinguished lawyer who has since become a judge of the District Court for the Southern District of New York. According to the Government's petition, the Knapp Commission sought the assistance of the Department of Justice; the New York City Police Commissioner "thoroughly endorsed" a federal investigation of the Queens County

involved conduct violating the Travel Act, 18 U.S.C. § 1952. We readily appreciate the justified indignation this aroused and can understand the consequent desire of federal law enforcement officials to clean these Augean stables of the State. That Archer has been dismissed from his post as a result of the Government's efforts is indeed a "good" result, as the petition repeatedly emphasizes. None of this, however, is relevant to the sole issue decided, namely, that the evidence here did not show a federal crime under a fair reading of the Travel Act.

The Government devotes much of its petition to issues which we felt desirable to ventilate in view of the appellants' arguments but were at pains neither to decide nor to pronounce dicta. Nine pages of the petition are devoted to an attempt to show that the Government agents committed no crimes and that what it chooses to call the "investigating technique" here employed "was entirely proper," although we expressly left "resolution of this difficult question for another day," —— F.2d at ——, slip opinion at 4821. The final pages of the petition stoutly maintain that "The Government's investigation of local corruption in this case was a proper and necessary use of federal power." The case for this assertion would certainly be stronger if, as the Government advises us now, as it did not in its brief or argument, there was reason to believe that the local corruption in Queens had involved some violations of the Travel Act. But we specifically declined to decide whether we could or should dismiss the prosecution as an abuse of federal power, —— F.2d at ——, slip opinion at 4823. We thus need only consider

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prosecutor's office; and "the United States Attorney disclosed the plan to a member of the state judiciary with administrative responsibility over the state court system in Queens." While this lessens the offensiveness to the State of the conduct here at issue, local invitations cannot expand the constitutional and legislative limitations on federal criminal jurisdiction.

Point I of the petition, in which the Government urges that we gave too narrow a reading to the Travel Act.

Despite the copious citation of cases, including many not included in its original brief, not one of the Government's citations supports application of the Travel Act where the sole "federal" elements were telephone calls from or to an undercover agent. Despite grave reservations whether interstate or foreign travel or transportation or use of interstate or foreign telephone facilities by an undercover agent, as distinguished from actual participants in the crime, can ever supply the federal jurisdictional basis required by the Travel Act, we left open the possibility that this might suffice when sufficiently pervasive or functional. Our holding was on the narrow basis that these conditions were not here fulfilled. In its petition for rehearing, the Government argues that there was at least evidence of an agreement to make interstate or foreign calls, thus justifying the conviction on the conspiracy count, and that legislative history and prior decisions require us to hold that the Las Vegas and Paris calls were sufficient to invoke the Travel Act. We disagree.

On the first point, the Government asserts that "Klein and Wasserberger had, before any actual travel or use of an interstate facility, agreed to use such facilities to promote the bribe." However, the Government greatly overstates the evidence as to the alleged agreement. The transcript of the tape recording of the critical conversation between Bario, Wasserberger and Klein reveals the following: Klein said he must have the bribe money in advance. For that purpose he needed a way to get in touch with Bario. Bario responded that he had no phone in Las Vegas and that he would be out of the country a great deal in the near future. He added that Wasserberger knew whom to call to ensure that the money would be there on time. "There are some people who know exactly where I am at

all times," Bario assured Klein. That answer seemed to satisfy Klein, for he made no further inquiries concerning Bario's whereabouts.

Bario and Wasserberger then left Klein's office. The Government states that "Wasserberger and Bario agreed that Bario should call Klein directly to find out if Klein could guarantee that the case would be fixed." That characterization, however, is misleading. Actually, Bario independently proposed that he should call Klein, and he made no mention of where he would be at the time he intended to call. Contrary to the Government's assertion, Bario was given no instructions to call Klein's office on April 25 or any other date; in fact, when Bario called, Klein could only say that he would have some news for him the next day.

The Government insists that it was only after Klein and Wasserberger had exerted great pressure on Bario that he was forced to contrive a Las Vegas "cover." Yet the pretended Nevada connection had been part of the Government's plan from the first. Bario testified at trial that when Klein asked where he lived, he gave the Las Vegas address that the Government had originally supplied for him on his identification papers. Later, while Bario and Wasserberger were driving back to Manhattan, Wasserberger mentioned that he might someday want to visit Las Vegas. It was in response to Wasserberger's expression of interest in visiting him there that Bario volunteered he could be reached at the Sahara Hotel.

In light of this evidence, there is no indication that the defendants agreed either to make or to cause to be made any interstate or foreign telephone calls. At the conclusion of the meeting, Klein expected that he could reach Bario by calling Wasserberger; through Bario's subsequent fabrication, Wasserberger learned—or thought he learned—that Bario could be reached at the Sahara Hotel,

but no plans were made for Wasserberger to call him there. The Government points to no further evidence of any agreement.

Besides insisting that the defendants agreed to make interstate or foreign calls, the Government disputes our conclusion that the calls themselves were insufficient to invoke the Travel Act. While it has wisely abandoned its reliance on the Newark calls, it contends that Bario's call from Paris and Wasserberger's unsuccessful attempts to reach Bario in Las Vegas sufficed to meet the jurisdictional requirements of § 1952. We disagree. The Nevada calls are of no jurisdictional significance. Although the Government insists that those calls were not "planted," but were "suggested, pressed for and accomplished solely by the defendants without any encouragement by Bario and despite Bario's actively discouraging such calls," the evidence summarized above shows that Bario volunteered the story about reaching him at the Sahara Hotel, consistent with the Government's design to present him as a Las Vegas underworld figure. Moreover, while Wasserberger made the calls in an effort to convey information to Bario about the proposed bribe attempt, there was no possibility at any time that the calls could further the enterprise or even go through to the intended recipient.[2]

The Government insists that the Paris call was one that the defendants "caused" Bario to make, but it is clear from

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2 The Government cites *United States* v. *Hedge*, 462 F.2d 220 (5 Cir. 1972), as contrary to the result reached here. In that case the Mississippi-based defendants ordered numerous sets of dice from a Las Vegas manufacturing company for which one of them worked as a salesman. The dice arrived in the mail, but the defendants refused to pay for them and they were returned unclaimed. The court upheld their Travel Act convictions even though there was no direct relationship between the use of the mails and the subsequent unlawful gambling. Unlike the Las Vegas calls here, the dice shipment was a bona fide operation which, until the defendants refused delivery, had every prospect of promoting the gambling enterprise.

the evidence outlined above that Bario made the call on his own initiative. The Government places great weight on the fact that Bario was in Paris on legitimate business and was not sent there solely to manufacture jurisdiction in this case. But that fact alone is not sufficient to qualify the Paris call. Any such holding would permit the Government to convert any local bribery it had provoked into a federal offense by furnishing an out-of-state address for an undercover agent or sending him outside the state on a legitimate errand and having a call made before the offense was consummated. The Travel Act confers ample power on federal law enforcement officers to assist local officials without going so far. Both the legislative history summarized in our opinion and the additional extracts relied on in the Government's petition show that the overriding Congressional purpose was to permit the federal government to act against members of organized crime whose activity crossed state lines when local law enforcement officers were unable or unwilling to do so—not to extend federal power to deal with corruption in local prosecutors' offices by affording the corrupters an opportunity to use interstate or foreign telephone facilities in dealing with an undercover agent on any such "casual and incidental" basis as here. See *United States* v. *Corallo*, 413 F.2d 1306, 1325 (2 Cir.) , *cert. denied*, 396 U.S. 958 (1969).

While the Government professes alarm at the precedential effect of our decision, we in fact went no further than to hold that when the federal element in a prosecution under the Travel Act is furnished solely by undercover agents, a stricter standard is applicable than when the interstate or foreign activities are those of the defendants themselves and that this was not met here. We adhere to that holding and leave the task of further line-drawing to the future.

The petition for rehearing is denied.